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A.F.R.

2006

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

DIVISION BENCH

CORAM : HON'BLE SHRI S.R. NAYAK, CJ
& HON'BLE SHRI D.R. DESHMUKH, J.

Writ Petition (T) No. 3447 of 2006

PETITIONER

Godawari Power and Ispat Ltd.
Having its registered office and Works at Plot No. 428/2, Phase I, Industrial Area, Siltara, Raipur (C.G.) and having its Corporate Office at Hira Arcade, 1st Floor, New Bus Stand, Pandri, Raipur (Chhattisgarh) through Y.C. Rao, S/o Shri Y. Mandali, aged about 40 years, Company Secretary, R/o Avani Vihar, Raipur (C.G.)

VERSUS

RESPONDENTS

1. State of Chhattisgarh through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist floor, Bairen Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition No. 2384 of 2006

PETITIONER

Jindal Steel & Power Limited, A Company incorporated under Companies Act, 1956, having its Corporate Office at Jindal Centre 12, Bhikaji Cama Place, New Delhi through Power of Attorney Holder & General Manager, Shri Mahendra Lakhotia, S/o Late Riddhikaran Lakhotia, aged about 50 years, R/o D-3, Sector –I, Avanti Vihar Colony, Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)

2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary

Writ Petition No. 5440 of 2005

PETITIONERS

1. The Associated Cement Companies Limited, A Public Limited Company, having its registered office at Mumbai, Cement House, 121, Maharshi Karve Road, Mumbai, and having one of its Cement Units at Jamul, Dist. Durg (C.G.)

2. H.S. Bhatti,
S/o Shri J.S. Bhatti,
Share Holder of The Associated Cement Companies Limited,
Resident of HIG 1/1075,
Housing Board Bhilai,
District Durg (C.G.)

VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through Secretary (Energy), Mantralaya, D. K.S. Bhawan, Raipur (C.G.)
2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (C.G.), Through its Secretary.
3. Chief Electrical Inspector, Govt. of Chhattisgarh, 36/437, Ist floor, Bairon Bazar, Raipur (C.G.)

Writ Petition No. 6394 of 2005

PETITIONER

Century Cement,
(Prop. Century Textiles & Industries Limited), P.O. Baikunth, District Raipur (C.G.) having its Registered Office at Century Bhawan, Dr. Annie Basent Road, Mumbai-400025 (Maharashtra)

VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through Secretary (Energy), Mantralaya, D. K.S. Bhawan, Raipur (C.G.)
2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (C.G.), Through its Secretary.
3. Chief Electrical Inspector, Govt. of

Chhattisgarh, 36/437, Ist floor, Bairon Bazar, Raipur (C.G.)

Writ Petition No. 1556 of 2006

PETITIONER

Grasim Industries Limited Cement Division), a Public Limited Company incorporated Under Companies Act 1956, Having its Registered Office at Birlagram, Nagda, 456 331 (MP) & having Cement Manufacturing in name of "Grasim Cement" at P.O. Grasim Vihar, Tahsil Simga, District Raipur (CG) through its authorized signatory Vinod Kumar Mangla, S/o Late Shri T.S. Mangla, aged 41 years, Occupation – Service, presently working as Sr. Officer (Legal), Grasim Cement (A Unit of Grasim Industries Ltd.), PO. Grasim Vihar, District Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through The Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur Through its Secretary, Raipur (Chhattisgarh)
3. Chief Electrical Inspector, Government of Chhattisgarh, 36/347, Ist floor, Bairen Bazar, Raipur (Chhattisgarh)

Writ Petition No. 1851 of 2006

PETITIONER

Ultra Tech Cement Limited, A Company incorporated Under the Companies Act, 1956, having its Registered Office at 'A' Wing, Ahura Centre, 1st Floor, Mahakali Caves Road, Andheri (E), Mumbai (Maharashtra), Having its Cement Plant at Hirmi Cement Works, Hirmi Dist. Raipur (Chhattisgarh) Through its Vice President Jitendra Kumar, S/o Shri Vishwanath Pratap Singh, Aged about 60 years, R/o Hirmi Cement Works, Hirmi Distt. Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through The Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur Through its Secretary, Raipur (Chhattisgarh)
3. Chief Electrical Inspector, Government of Chhattisgarh, 36/347, Ist floor, Bairen Bazar, Raipur (Chhattisgarh)

Writ Petition No. 1554 of 2006

PETITIONER

Lafarge India Pvt. Ltd.,
Having its Registered Office at Bakhtawar, 14th Floor, 229 Nariman Point, Mumbai (Maharashtra) Through its Authorised signatory Mr. Sushil Kumar Tiwari.

VERSUS

RESPONDENTS

1. State of Chhattisgarh through Secretary, (Energy) Mantralaya, D.K.S. Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/437, Ist floor, Bairan Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (C.G.), through its Secretary.

Writ Petition No. 1787 of 2006

PETITIONER

Ambuja Cement Eastern Ltd., P.O. Rawan, Tahsil Baloda Bazar, District Raipur (C.G.) Through its Authorised Signatory Shri Anoop Kumar Jaiswal, S/o Late Shri Loknath Jaiswal, Aged about 43 years, Officer (Law), Ambuja Cement Eastern Ltd., P.O. Rawan, Tahsil Baloda Bazar, District Raipur (C.G.)

VERSUS

RESPONDENTS

1. State of Chhattisgarh
Through Secretary, (Energy) Mantralaya, D.K.S. Bhawan, Raipur (Chhattisgarh)

2. Chief Electrical Inspector Government of Chhattisgarh, 36/437, Ist Floor, Bairan Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (C.G.), through its Secretary.

Writ Petition No.2616 of 2006

PETITIONER Bharat Aluminium Co. Ltd., Balconagar, Korba, Dist. Korba (Chhattisgarh) through its President & Whole time Director & having its Registered Office at Aluminium Sadan, Core-6, Scope 7, Lodhi Road, New Delhi.

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition No.2613 of 2006

PETITIONER Monnet Ispat & Energy Limited, Monnet Marg, Mandir Hasaud, District Raipur, (Chhattisgarh) through Authorized Signatory P. Das, Dy. General Manager (Finance), Mandir Hasaud & having its Head office at Mohta Building, 3rd floor, 4, Bhikaji Cama Place, New Delhi.

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

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Writ Petition No.2913 of 2006

PETITIONER M/s. Prakash Industries Limited

A Company incorporated under the Companies Act, 1956 having its Registered office at 15 Km. Stone, Delhi Road, Hissar, (Haryana) & having its sponge Iron Plant at Village Kotadabri, Champa, District Janjgir-Champa through its President (Corporate Affairs) & Power of Attorney Holder M/s. Prakash Industries Ltd., Champa (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairon Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition No.2920 of 2006

PETITIONER Chhattisgarh Electricity Co. Ltd., Having its registered office and Plant at Industrial Growth Centre, Siltara, Raipur (Chhattisgarh) & having its Head Office at 125 B, Wing, Mittal Court, Nariman Point, Mumbai-400021 through its Power of Attorney Holder Gopal Ranjan Panigrahi, S/o Shri Chinmay Prasad Panigrahi Aged about 30 years, Legal Officer, R/o Nilancha Vihar, Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)

3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition No.2661 of 2006

PETITIONER Indsil Energy & Eectrochemicals Limited , Plot No. 114 to 122, Sector "C", Urla Industrial Area, Raipur (Chhattisgarh) through its Resident Director & Authorized Signatory Brig. (Retd.) S.N.Vishnu, Raipur, having its Registered Office at 49, Avanshi Road, Coimbatore 641 037 (TN)

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition No. 3915 of 2006

PETITIONER M/s NALWA Sponge Iron Limited, Post Box No.7, Taraimal, Raigarh District Raigarh (Chhattisgarh) through Authorized Signatory N.K. Sharma, Head (HR & PA) M/s NALWA Sponge Iron Limited, Post Box No.7, Taraimal, Raigarh having its Registered Office at 28, Najafgarh Road, New Delhi.

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Assistant Engineer (Electrical Safety) & Assistant Electrical Inspector, Government of Chhattisgarh, Raigarh Sub Division, Pt. Lochan Prasad Pandey Archaeological Museum Building, Behind O/o Police, Raigarh (CG)

3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition (C) No.3991 of 2006

PETITIONER Shri Bajrang Power & Ispat Limited, Village Borjhara, Urla-Guma road, Raipur, District Raipur (Chhattisgarh) through its Power of Attorney, Shravan Kumar Goel, General Manager (Project), aged about 40 years, S/o Shri B.P. Goel, having its Registered & Head Office at 522/C, Urla Industrial Area, Raipur, Dist. Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition (T) No.3971 of 2006

PETITIONER Jayaswal Neco. Ltd.,
Steel Plant Division,
Siltara Growth Centre,
Through Mr. S.P. Naik,
General Manager (Electrical),
& Attorney Holder for Jayaswals
Neco Ltd.

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary (Energy), Mantralaya, D. K. S. Bhawan, Raipur (C.G.)
2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairan Bazar, Raipur (C. G.)
3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur

(C. G.), through its Secretary.

Writ Petition (T) No.4604 of 2006

PETITIONER M/s.IND SYNERGY LIMITED

A Company incorporated under the Companies Act, 1956 having its Registered office at 10 Daga Layout, North Ambazhari road, Nagpur- 440 033 (Maharashtra) & having its steel & power Plant at Village Kotmar, District Raigarh Village Kotmar, District Raigarh through its General Manager HRD & Admn.).

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)
2. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.
3. Assistant Engineer (Electrical Safety) & Assistant Electrical Inspector, govt. of Chhattisgarh, Raigarh Sub-Division, Pt. Lochan Pasad Pandey Archeological Musuem Building, Behind o/o Supdt. Of Police, Raigarh (Chhattisgarh).

Writ Petition (T) No. 4854 of 2006

PETITIONER Vandana Global Limited, Siltara Industrial Area, Phase-II Siltara, Raipur (Chhattisgarh) through its Power of Attorney Holder Saurabh Kumar Bajpai, S/o Shri Raj Kumar Krishna Kumar Bajpai, aged 37 years, R/o D-5, Parijat Extension, Nehru Nagar, Bilaspur (Chhattisgarh) having its registered Office at "Vandana Bhawan", M.G. Road, Raipur (Chhattisgarh)

VERSUS

RESPONDENTS

1. State of Chhattisgarh Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)

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2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Bairen Bazar, Raipur (Chhattisgarh)

3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

Writ Petition (T) No. 5041 of 2006

PETITIONER Madhya Bharat papers Ltd.,
At Village Birghani, Post. Champa, Dist. Janjgir-Champa (Chhattisgarh) through its Commercial Manager & having its Registered Office at Village Birghani, Post. Champa, Dist. Janjgir-Champa (Chhattisgarh).

VERSUS

RESPONDENTS

1. State of Chhattisgarh
Through Secretary, Department of Energy, Mantralaya, Dau Kalyan Singh Bhawan, Raipur (Chhattisgarh)

2. Chief Electrical Inspector Government of Chhattisgarh, 36/347, Ist Floor, Byron Bazar, Raipur (Chhattisgarh)

3. Chhattisgarh State Electricity Board, Sundar Nagar, P.O. Dangania, Raipur (Chhattisgarh), through its Secretary.

4. Accounts Officer, Chhattisgarh State Electricity Board, Janjgir, Distt. Janjgir-Champa (Chhattisgarh).

Writ Petition (C) No. 5468 of 2006

PETITIONER M/s Real Ispat & Power Limited,
A Company incorporated under Companies Act, 1956, having its office at Vrindhavan, Near Holy Hearts School, Civil Lines, Raipur, through its Director Umesh Agrawal, S/o T.C. Agrawal, Aged about 43 years, R/o Opp. Telephone Exchange, Civil Lines, Raipur (Chhattisgarh)

VERSUS

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RESPONDENTS

1. State of Chhattisgarh
Through Secretary, Department of Energy, D.K.S. Bhawan, Mantralaya, Raipur (C.G.)

2. Chhattisgarh State Electricity Board,
Through its Secretary
Sunder Nagar, P.O. Dangania,
Raipur (CG)

Present: Shri A.M. Singhvi, Shri Jayant Bhushan, Shri Ravindra Shrivastava, Shri Manindra Shrivastava, learned Sr. Advocates with Shri Sanjeev K. Kapoor, Shri Anubhav Singhvi, Shri Ashish Shrivastava, Shri Amrito Das, Shri Prem Francis and Shri Sanjay K. Agrawal & Shri Vishnu Koshta, learned Advocates for the petitioners.

Shri Ravish Agrawal, learned Advocate General with Shri Prashant Mishra, learned Additional Advocate General and Shri Utkarsh Verma, learned Deputy Govt. Advocate for the respondents / State.

Shri A. S. Gaharwar, learned Standing Counsel for respondents / Chhattisgarh State Electricity Board.

ORDER

(Passed on 15th December, 2006)

The following oral order of the Court was passed by

S.R. NAYAK, CJ .

In this batch of writ petitions, the constitutional validity of Section 3 (1-a) of the Chhattisgarh Upkar (Sanshodhan) Adhiniyam, 2004 (hereinafter called as "the Act") has been challenged. For the sake of convenience, the relevant portion of the amended Section 3 of the Act is quoted hereinbelow :

> "3. Levy of Energy Development Cess :
>
> (1) Subject to the exceptions as specified in Section 4, every distributor of electrical energy shall pay to the State Government at the prescribed time and in the prescribed manner an energy development

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cess at the rate of five paisa per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month.

(1-a) Every producer of electrical energy shall pay to the State Government an energy development cess at the rate of ten paisa per unit on the electrical energy sold or supplied to a consumer or consumed by himself or his employees by his captive power unit or diesel or other generator set of more than 100 Kilowatt capacity during any month :

Provided, that ....."

(2) **Legislative History :**

The Legislature of the erstwhile undivided State of Madhya Pradesh enacted the M.P. Upkar Adhiniyam, 1981 (hereinafter called as "the 1981 Adhiniyam") for levy *inter alia* of energy development cess. Sub-Section (1) of Section 3 of the 1981 Adhiniyam which was the charging Section, read as under :

" Subject to the exceptions specified in Section 4, every distributor of electrical energy shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of one paisa per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month....."

Section 3 (1) of the 1981 Adhiniyam thus imposed on every distributor of electrical energy an energy development cess @ 1 paisa per unit on *'the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month'*. On the reorganisation of the State of Madhya Pradesh and formation of the State of Chhattisgarh

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on 01-11-2000, the entire Adhiniyam was adopted by the State of Chhattisgarh and was renamed as Chhattisgarh Upkar Adhiniyam, 1981.

(3) State of Madhya Pradesh had enacted an amendment to Madhya Pradesh Upkar Adhiniyam, 1981 in the year 2001 by which Section 3 (2) was added. Under this sub-Section (2) every producer producing electrical energy by his captive power unit was liable to pay to the State Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month. The constitutional validity of the above amendment was assailed and ultimately in the case of **M.P. Cement Manufacturers Association Vs. State of M.P. & others** [1], the Hon'ble Supreme Court struck down the amendment by holding that the energy development cess was a tax and it was levied essentially on production of electricity and not on sale or consumption of electricity and, therefore, it would not fall within the ambit of Entry 53 of List II of 7th Schedule and thus would be invalid on the ground of lack of legislative competence.

(4) After the above judgment of the Hon'ble Supreme Court, the State of Chhattisgarh introduced the impugned levy by adding sub-Section (1-a) in Section 3 of the Act which is already extracted above. By way of these writ petitions, the petitioners who are the producers of electrical energy by their Captive Power Units have assailed the validity of sub-Section (1-a) of the Act and the demands raised under the impugned provision.

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1. (2004) 2 SCC – 249.

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Arguments :

(5) We have heard Shri A.M. Singhvi, Shri Ravindra Shrivastava, Shri Manindra Shrivastava, learned Sr. Advocates, Shri Sanjay K. Agrawal, Shri Vishnu Koshta, learned Advocates on behalf of the petitioners; Shri Ravish Agrawal, learned Advocate General, Shri Prashant Mishra, learned Addl. Advocate General on behalf of the State of Chhattisgarh and Shri A.S. Gaharwar, learned Standing Counsel for Chhattisgarh State Electricity Board.

(6) The sum and substance of the contentions raised by learned counsel for the petitioners before us while assailing the constitutional validity of the impugned provision are the following :

(i) that the impugned provision is *ultra vires* the legislative competence of the State Legislature under Entry 53 of List II of 7th Schedule of the Constitution of India, inasmuch as the tax is on production of electrical energy and not on sale or supply of electrical energy ;

(ii) that the impugned provision is a piece of colourable legislation and the State of Chhattisgarh has encroached upon the exclusive field of legislation assigned to the Parliament under Entry 84 of List I ;

(iii) that there is a difference between a tax and cess; levy of cess presupposes availability of a benefit and as such there is an implicit requirement of nexus between the levy and the benefit for the availability of which cess is sought to be levied ; though the scheme of levy of cess is expressly reinforced in Section 3, as amended, to reflect the legislative intention that the cess is not to be levied as part of common burden depending upon the capacity to pay and for augmentation of revenue, but the purpose as well as the basis of cess is quantifiable, identifiable and

measurable benefit as enumerated under sub-Sections (2) and (3) of Section 3, the utilization of energy development fund is designedly and purposely left at the discretion of the executive and, therefore, it cannot be regarded as a tax ;

(iv) that the impugned levy is discriminatory and violative of Article 14 of the Constitution inasmuch as a hostile discrimination is meted out to only a sub-class of class of producers, namely, Captive Power Producers and leaving the Independent Power Producers untouched by imposition and this differential treatment meted out to two sub-classes of the same class of producers tantamounts to an invidious discrimination and

(v) that the impugned levy is quite contrary to the National Electricity Policy, National Tariff Policy, Report of the Task Force and the Recommendation of the Chhattisgarh State Electricity Regulatory Commission.

(7) Shri Ravish Agrawal, learned Advocate General and Shri A.S. Gaharwar, learned Standing Counsel for Chhattisgarh State Electricity Board while supporting the constitutional validity of the impugned provision and the demands raised thereunder would point out that in the case of **M.P. Cement Manufacturers Association (Supra 1)** taxing event was generation of electricity, whereas, under the provision impugned in this batch of writ petitions taxing event is sale or supply of electricity. Learned Advocate General would point out that in the case of **M.P. Cement Manufacturers Association (Supra 1)** the Hon'ble Supreme Court declared the statute impugned therein as unconstitutional being outside the legislative competence of the Madhya Pradesh State so far as levy of cess on generation of electricity was concerned, whereas

Chhattisgarh Legislature by amending 1981 Adhiniyam and inserting Section 3 (1-a) has removed the very basis which led to quashing of the earlier amendment made by the Madhya Pradesh Legislature in the year 2001. Learned Advocate General would submit that the impugned levy of cess is on the sale and consumption of electricity generated by a Captive Power Plant and not on generation of electricity itself.

(8) Having heard learned counsel for the parties, the only question that arises for our consideration is whether the impugned provision is invalid on any permissible ground.

(9) In India, the doctrine of "power to tax" is embodied in Article 265 of the Constitution. The Legislature is omnipotent in the exercise of the taxing prerogative, however, subject to the provisions of the Constitution. The right to impose taxes and to determine the circumstances under which they will be done is always a privilege of the concerned Legislature. Article 265 mandates that no tax shall be levied or collected except by the authority of law. The power to tax is an incident of sovereignty. Apart from the limitation by the division of the taxing power between the Union and the State Legislatures by the relevant entries in the Legislative Lists, the taxing power of either Legislature is subjected to certain limitations imposed by the Constitution. For example, the taxing power of a Legislature must not contravene Article 13 as held in **Kunnathat Thathunni Moopil Nair Vs. State of Kerala** [2] ; it must not deny equal protection of the laws as guaranteed under Article 14 as held in **State of Kerala Vs. Kutty Naha, Haji K. Haji K** [3]; and it must not be discriminatory or arbitrary as held in **Ayurveda Pharmacy Vs. State of**

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2. AIR 1961 SC 552 ; 3. AIR 1969 SC 378 ;

Tamil Nadu [4] ; Regional Transport Officer – Cum – Taxing Authority, Rourkela Vs. Steel Authority of India [5] ; it must not constitute an unreasonable restriction upon the right of business guaranteed under Article 19 (1) (g) as held in Chandrakanth Krishnarao Pradhan Vs. Jasjit Singh [6] . Apart from these constitutional limitations on the law making power of the concerned Legislature, the other limitations on the taxing power of the Legislature can be culled out from the provisions of Articles 27, 285, 286, 287 and 289.

(10) A power conferred on the Legislature to levy tax must be widely construed. It must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise include the power to fix the rate and prescribe the machinery for the recovery of tax including provisions necessary to prevent evasion of tax. The Legislature can also appoint authorities for collecting taxes and may prescribe the procedure for determining the amount of taxes payable by any person. All these provisions are subsidiary to the main power to levy a tax. Nevertheless, all this is subject to the constitutional limitations, as pointed out supra. Therefore, it becomes necessary that even tax statutes have to satisfy the test of reasonableness prescribed by Article 19(6) and the fundamental right of equality before law guaranteed by Article 14 of the Constitution. In tax matters, the State is allowed to pick and choose districts, objects, persons, methods and even rates of taxation if it does so reasonably, as held by the Supreme Court in Balaji Vs. ITO [7] ; B. Basavalingappa Vs. State of Karnataka [8]. The entries in the

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4. (1989) 8 APSTJ – 179 (SC) = AIR 1989 SC 1230;
5. 1995 Suppl. (4) SCC 165 ; 6. AIR 1962 SC 204 ;
7. (1961) 43 ITR – 393 (SC) ; 8. (1985) 59 STC – 1, 6 (Kar.)

Legislative Lists of the Constitution were not powers but were only fields of legislation and therefore the widest importance and significance should be given to the language used by the Legislature in various entries. In interpreting the fiscal statutes, we must also remember the provisions in a fiscal statute are not to be so construed as to furnish a chance of escape and a means of evasion as held by the Full Bench of the Karnataka High Court in **C. Arunachalam Vs. CIT** [9] . A Full Bench of Andhra Pradesh High Court in **Shri Lakshmi Venkateswara Trading Co. Vs. State of A.P.** [10] , has opined that the power to tax includes the power to pick and choose objects and persons for the purpose of taxation and to grant exemptions. In the matter of taxation laws, as held by Apex Court in **M/s Steelworth Ltd. Vs. State of Assam** [11] ; **Gopal Narain Vs. State of U.P.** [12]; **Ganga Sugar Corpn. Ltd. Vs. State of U.P.** [13]; **Mafatlal Industries Ltd. Vs. Union of India** [14] ; **Khyerbari Tea Co. Ltd. Vs. State of Assam** [15] ; **State of Kerala Vs. Arvind Ramakant Modawadakar** [16], the Courts permit a greater latitude to the discretion of the Legislature in the matter of classification. State has wide discretion in respect of classification of objects, persons and things for the purposes of taxation. The Legislature can devise classes for the purpose of taxing or not taxing, exempting or not exempting, granting incentives and prescribing rate of tax, benefits or concessions as held by the Apex Court in **State of U.P. Vs. Kamla Palace** [17] . Thus, as to what article should be taxed is a question of policy and there cannot be any complaint merely because

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9. ILR 1984 2 Kar. 1387 (FB) ; 10. (1974) 33 STC 192 (AP – FB)
11. 1962 Supp. (2) SCR 589 ; 12. AIR 1964 SC 370 ;
13. AIR 1980 SC 286 ; 14. (1997) 5 SCC 536 ;
15. AIR 1964 SC 925 ; 16. (1999) 7 SC 400 ;
17. AIR 2000 SC 617 ;

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Legislature has decided to tax certain articles and no others. The freedom of the Legislature is conceded not only in the choice of the articles to be taxed but also as regards the manner and rate of taxation i.e., to prescribe different rates for different categories of goods, persons and transactions, as held by the Supreme Court in **Twyford Tea Co. Ltd. Vs. State of Kerala** [18] . It is also well settled that the Court would be slow to interfere with the Legislative discretion in the matter of choice of persons, transactions or objects or different rates, even if no reasons are disclosed for such choice, unless it is shown to be capricious or whimsical, in the circumstances of the case. Now in the premise of the above noted well settled principles governing the challenge to constitutional validity of taxation law, let us consider the contentions raised by the learned counsel for the petitioners.

(11). It is well settled law that a law made by Parliament or Legislature can be struck down by Courts only on two grounds and those two grounds are, *viz.*, lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. It is also well settled law that no enactment can be struck down by just saying that it is arbitrary or unreasonable. The Supreme Court in the case of **State of A.P. vs. Mc. Dowell & Co.** [19], in para (45) has observed :

> " ..... No Court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the powers of the

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18. AIR 1970 SC 1133 ;

19. (1996) 3 SCC 709 ; = AIR 1996 SC 1627 ;

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Congress and the State Legislatures to make laws is limited in two ways, *viz.*, the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter the State Legislature is restricted in two ways. A law made by Parliament or the Legislature can be struck down by Courts on two grounds and two grounds alone, *viz.*, (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness – concepts inspired by the decisions of the United States Supreme Court. Even in USA, these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the Courts as arbiters of the wisdom of the Legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19 (1), it can be struck down only if it is found not saved

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by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment can not be struck down on the ground that Court thinks it unjustified. Parliament and Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds *viz.*, (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety **(Council of Civil Service Unions V. Minister of Civil Service, 1985 AC 374 = (1984) 3 ALL ER 935 = (1984) 3 WLR 1174,** which decision has been accepted by this as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in **R. v. Secy. Of State for Home Deptt. Ex. P. Brind, 1991 AC 696 = (1991) 1 All. ER 720**) It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted. ...."

(12). It is trite, the presumption is always in favour of constitutionality of an enactment and the burden is upon him who attacks it to show that

there has been a clear transgression of constitutional principles and limits, whether it is a pre-constitutional or post-constitutional law. This position is well settled by the judgments of the Apex Court in **Chiranjit Lal vs. Union of India** [20]; and **Madhu Limaye v. Sub-Divisional Magistrate** [21];. In Cf **Rao Bahadur vs. State of U.P.** [22], the Supreme Court held that the burden of proving all the facts which are requisite for the constitutional invalidity is upon the person who challenges the same. However, it is not to State that by reason of the presumption in considering the validity of the impugned law, the Court will be restricted to the pleadings only. The Court would be free to satisfy itself whether under any provision of the Constitution the impugned law can be sustained having due regard to the circumstances in which such law was enacted, as held by the Supreme Court in **Burarkar Coal Co. V. Union of India** [23] and **Hardard Dawakhana V. Union of India** [24]. For the same reason, the Court should, if possible, make such a progressive and/or narrow construction of the impugned statute as would sustain its constitutional validity, as opined by the Supreme Court in **Sunil Vs. Delhi Admn.** [25]. The Supreme Court in **Naresh Vs. State of Maharashtra** [26] has opined that the Courts should not cover grounds or make observations on points not directly involved in the proceedings, thereby meaning that unless a point arises for consideration and decision out of the pleadings of the parties, the Court shall not express its opinion on such point. It is well settled by the judgments of the Supreme Court in **Diamond Sugar Mills vs. State of U.P.** [27], **Navinchandra vs. Commissioner of Income Tax** [28] and in **Peerless Vs. R.B.I.** [29], that when the vires of an enactment is challenged,

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20. (1950) SCR 869 ; 21. AIR 1971 SC 2486 ; 22. (1953) SCR 1188 ;
23. AIR 1961 SC 954 ; 24. 1960(2) SCR 671 ; 25. AIR 1978 SC 1675 ;
26. AIR 1967 SC 1 ; 27. AIR 1962 SC 652 ; 28. 1955 (1)SCR 829 ;
29. AIR 1992 SC 1033 ;

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and there is any difficulty ascertaining the limits of a Legislature's power, the difficulty must be resolved, so far as possible, in favour of the legislative body, putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude, and looking at the substance of the Legislation.

(13) In India, any law to be valid has to satisfy the requirements of constitutional limitations contained in the Constitution. The first such requirement is that it should be passed by the competent legislature, that is to say, the subject matter of the Law should belong to that legislature according to the distribution of legislative power between the Union of India and the States. Secondly, the law should not infringe the fundamental rights guaranteed in Part III of the Constitution of India or any other substantive constitutional provisions. In **State of A.P. Vs. Mc. Dowell & Co. (Supra 19)**, the Supreme Court, as already noted above, has opined that except the above two grounds, there is no third ground on the basis of which the law made by the competent legislature can be invalidated and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds. Essentially, the question of constitutionality is always a question of power. It is true that it will become the duty of the Constitutional Courts under our Constitution to declare a law enacted by the Parliament on the State Legislature as unconstitutional when the Parliament or the State Legislature has assumed to enact a law which is void, either from want of constitutional power to enact it, or because the constitutional forms or conditions have not been observed, or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution or any other substantive constitutional provisions.

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(14) Legislature and Judiciary are coordinate organs of the State, of equal dignity and status under the constitutional scheme. It is permissible for the constitutional Courts to declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. The Court while declaring the law as invalid or unconstitutional is only enforcing the legislative will and the limits imposed by the Constitution on the law-making bodies. No Court can declare a statute unconstitutional and void, solely on the ground of unjust and harsh provisions, or because it is supposed to violate some natural, social, political or economic rights of the citizen, unless it can be shown that such injustice is, in fact, prohibited or such rights guaranteed or protected by the Constitution. Strictly speaking, the Courts are not guardians of all kinds of rights of the people of the State, unless those rights are secured and protected by some constitutional provision which comes within the judicial cognizance.

(15) In ' **A Treatise on the Constitutional Limitations by Thomas M. Cooley'**, it is stated that the Court cannot run a race of opinions upon points of right, reason, and expediency with the law-making power, and that any legislative act which does not encroach upon the power apportioned to the other organs of the State, being *prima facie* valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the Constitution itself, and the case shown to come within them. In the same Treatise, it is also stated that the Courts are not at liberty to declare statutes void because of their apparent injustice and impolicy, neither can they do so because they appear to the minds of the Judges to violate fundamental rights of republican Government, unless it shall be found that those rights are placed beyond legislative encroachment by the

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Constitution nor are the Courts at liberty to declare an enactment unconstitutional, because in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words or discernible from the context. It is not permissible to limit the legislative power of the Legislature by the judicial interposition, except so far as the expressed words a written Constitution gives that authority to the Court. Further, in the same Treatise by Thomas M. Cooley, it is aptly stated that the law-making power of the State recognises no restraints, and is bound by none except such as or imposed by the Constitution itself placing reliance on the opinion handed down in **Sill Vs. Village of Corning** [30].

(16) The Constitution of India has distributed legislative power between the Centre and the States. The three Lists of the Seventh Schedule to the Constitution of India do this job. List-I (Union List) enumerates the matters in respect of which the Parliament has the exclusive power to make the laws; List II (State List) contains the legislative fields reserved for State Legislature and List III (Concurrent List) lays down the items on which both the Parliament and the State Legislature can make the laws (with over-riding effect over the law passed by the Parliament).

(17). In this case, we are concerned with the following two Entries ; (i) Entry 84 of List –I (Union List) – "Duties of excise on tobacco and other goods manufactured or produced in India except – (a) alcoholic liquors for human consumption, (b) opium, Indian hemp and other narcotic drugs and narcotics; but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. " ;

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30. 15 NY 303.

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and Entry 53 of List II (State List) – " taxes on the consumption or sale of electricity. "

(18). In the case of **M.P. Cement Manufacturers Association (Supra[1])**, the impugned provision of sub-Section (2) of Section 3 read as follows :

> "(2) Every producer producing electrical energy by his captive power unit or diesel generator set of capacity exceeding 10 Kilowatt in total shall pay to the State Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month :
>
> Provided that no cess shall be payable in respect of electrical energy produced by –
>
> (i) the Government of India for consumption by that Government;
>
> (ii) the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India ;
>
> (iii) the State Government for consumption by that Government ;
>
> (iv) a rural electric cooperative society registered under the Madhya Pradesh Cooperative Societies Act, 1960 (17 of 1961) ;
>
> (v) the local bodies including Municipal bodies and Panchayats for consumption in public street lamp or lamps in any market place or waterworks or any other places of public resort maintained by such bodies:
>
> Provided further that the amount of energy development cess shall be collected by the Madhya Pradesh State Electricity Board and the amount so

collected shall be made available to the State Government. "

(19). In the case of **M.P. Cement Manufacturers Association (Supra[1])**, the Hon'ble Supreme Court having regard to the plain language used by the Legislature under sub-Section (2) of Section 3 was pleased to hold as under :

"14. A plain reading of sub-Section (2) of Section 3 introduced by the amendment to the 1981 Adhiniyam makes it clear that the levy of cess was "*on the electrical energy produced*". The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced" means that the cess would apply on units produced, whichever of the alternatives mentioned after the word "whether", namely, sale or supply or consumption is the case. There is no reason to assume that the words used did not reflect the intention of the legislature. The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under sub-section(1) and sub-section (2) were identical, the same language should have been used

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in both sub-sections. The deliberate change in language reflects an intention to alter the subject-matter of levy as far as producers were concerned.

15. Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3 (2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3 (2), what would be subjected to tax would be electrical energy *produced* by the five categories mentioned under the proviso. Although in Categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilization of the electrical energy produced, under Exception (iv), significantly, all electrical energy produced by a rural electrical cooperative society registered under the Madhya Pradesh Cooperative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

16. That the intention of the legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which

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accompanied the Act which replaced the Ordinance. It says :

'With a view to impose *cess on the electricity generated* by the producers from their captive power plants/diesel generating sets for self-consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (1 of 1982) suitably. "

Emphasis supplied)

17. There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State, admittedly, was incompetent to impose. "

(20). The legislative power of Chhattisgarh State Legislature to levy taxes on consumption or sale of electricity in terms of Entry 53 of List II of 7th Schedule of the Constitution cannot be doubted. The impugned provision Section 3(1-a) in unmistakable terms would show that the cess is levied at the rate of 10 paise per unit on the electrical energy **'sold or supplied'** (emphasis supplied by the Court) and there is no reference to the generation or production of electrical energy. In other words, cess is levied under Section 3 (1-a) only on sale or supply and not on generation or production of electrical energy. It is quite obvious that the Chhattisgarh State Legislature by enacting the impugned provision of Section 3 (1-a) has removed the very basis which led to quashing of the impugned provision in the case of **M.P. Cement Manufacturers Assn. (Supra 1)**, and, therefore, it cannot be said the Chhattisgarh State Legislature inserted sub-section (1-a) in Section 3 without legislative competence.

(21) There is also no merit in the contention that the impugned provision is a "piece of colourable legislation". Essentially, the question of

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constitutionality is always a question of power. It is needless to state that the whole doctrine of 'colourable legislation' revolves itself into the question of competency of a particular Legislature to enact a particular law. The constitution Bench of the Supreme Court in **Shankaranarayana vs. State of Mysore** [31], after referring to the *dictum* in **K. C. Gajapathi Narayan Deo vs. State of Orissa** [32], in paragraph (13) was pleased to observe :

> " ..... the whole doctrine of colourable legislation resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. It is open to the Court to scrutinize the law to ascertain whether the Legislature by device, purports to make a law which, though in form appears to be within a sphere, in effect and substance, reaches beyond it. "

(22) No motive can be attributed to Legislature and such a plea could never be entertained at all where constitutionality of the enactment is assailed. In the **Cooley's Treatise on the Constitutional Limitations**, it is stated thus :

> "From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, whether the Legislature in the particular case, in respect of the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. If

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31. AIR 1966 SC 1571;
32. AIR 1953 SC 375;

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so, the Courts are not at liberty to inquire into the proper exercise of the power in any case. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the Legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding. And although it has sometimes been urged at the bar, that the Courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. "

The judgment of the Supreme Court in **Mohan Lal Tripati Vs. District Magistrate** [33] , and in **State of Himachal Pradesh vs. Kailash Chand Mahajan** [34] are the authorities to state that a Legislature does not act on extraneous consideration and that an enactment cannot be struck down on the ground of *mala fide* and that no motive could be imputed to the Legislature. The Court, under no circumstances, can enquire into the motive of the Legislature to enact a law. What persuaded the Legislature to enact a law cannot be subject-matter of judicial scrutiny. In **State of Himachal Pradesh vs. Kailash Chand Mahajan (Supra 34),** the Supreme Court in paragraph 48 of the judgment was pleased to observe thus :

".....For adumbrating this policy a legislation is enacted by the State. It is not for this Court to find out whether there was any need for such a legislation. Of course, for lack of legislative competence or for

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33. AIR 1993 SC 2042 ;
34. AIR 1992 SC 1277;

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violation of the right to equality under Article 14 etc. The validity of the legislation may be scrutinized. But, certainly that is far from saying the Court could examine the legislation from the point of view that it came to be passed with *mala fide* intention. By long established practice, which has received approbation through authorities of this Court, it has always refrained from attributing *mala fides* to the Legislature. In fact, such a thing is unknown to law. Here again, we can usefully refer to the case **K. Nagaraj Vs. State of Andhra Pradesh (AIR 1985 SC 551).** In para 36 it is stated as :

> ".....The Legislature, as a body, cannot be accused for having passed a law for an extraneous purpose. Its reason for passing a law are those that are stated in the Objects and Reasons and if, none are so stated, as appear from the provisions enacted by it. Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive cannot render the passing of the law *mala fide*. This kind of 'transferred malice' is unknown in the field of legislation. "

(23). We, however, find considerable force and merit in the contention of the learned counsel for the petitioners that the impugned levy is discriminatory and violative of Article 14 of the Constitution of India. It is true that taxation law is no exception to the doctrine of equal protection as held by the Apex Court in **Khandige Sham Bhat vs. Agricultural ITO** [35], **State of M.P. vs. Gwalior Sugar Co.** [36], **Kunnathat Thathunni Moopil Nair Vs. State of Kerala (Supra2), State of A.P. vs. Nalla Raja Reddy**[37],

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35. AIR 1963 SC 591 ; 36. 1962 (2) SCR 619 ;
37. AIR 1967 SC 1458 ;

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Vishweshar Thirtha Swamiar vs. State of Mysore[38], **Ashwathnarayana Setty P.M. vs. State of Karnataka** [39]. Hence, a taxation law will be struck down as violative of Article 14 if there is no reasonable basis behind the classification made by the Legislature. However, if the taxation, generally speaking, imposes similar burden on every one with reference to a particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack. There is no violation of Article 14 if there is a reasonable basis for the classification. It needs to be noticed that whereas under Section 3(1) of the Act a distributor is charged energy development cess at the rate of 5 paise per unit, a captive power producer is charged at the rate of 10 paise per unit. Further, while the captive power producer is charged at the rate of 10 paise per unit, any other producer who is neither a distributor nor a captive power producer is not charged any energy development cess on any power produced by him whether it is sold by him to the State Electricity Board, consumed by him or his employees or sold by him to a third party. By giving certain examples, it could convincingly be shown that the impugned provision is discriminatory against the captive producers in various ways and that it cannot stand the scrutiny of Article 14 of the Constitution. The following are the examples to show how hostile treatment is meted out to the captive power producers :

Example (1) : Both the captive power producers and independent power producers sell power to the Board, but, the captive power producers are charged 10 paise per unit, whereas independent power

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38. 1972 (3) SCC 246 = AIR 1971 SC 2377 ;

39. AIR 1989 SC 100 ;

producers are not charged any cess with regard to the electricity supplied by them to the Board. This is totally discriminatory. The justification given by the State in paragraph 13 of the counter affidavit that the independent power producers are not charged any cess when such energy is supplied to the State Electricity Board to encourage establishment of independent power producers for supplying electrical energy to the Board, is totally specious. A captive power producer need not consume its entire power produced. Requirement of classifying as a captive generating plant has been laid down in Rule 3 of the Electricity Rules, 2005 as a power producer who captively consumes 51% or more of the power generated by it. Thus, where surplus electricity is supplied by a captive power producer to the State Electricity Board it fulfills exactly the same objective i.e. establishment of power projects from where electricity can be supplied to the State Electricity Board. It needs to be noticed that the impugned levy is not merely on electrical energy consumed by a captive producer, but also on electrical energy supplied by them to others including the State Electricity Board. It also needs to be noticed that the petitioners have long term contracts with Chhattisgarh State Electricity Board for supply of considerable quantum of power to it. Thus, there is absolutely no rational basis for discriminating captive power producers against independent power producers. In this context, it is also necessary to notice that a power producer who consumes less than 51% of the power produced by it (even if it as much as 50%) will not be classified as captive power producer and, therefore, would not be liable to pay any cess on the power sold, supplied or consumed by it.

Example (2) : In a case where a captive power producer sells power directly to a consumer and a private non-captive power producer also sells

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power directly to a consumer, the captive power producer is charged 10 paise per unit on such sale, whereas non-captive power producer is charged nothing. This is clearly discriminatory. A non-captive power producer can supply power to a consumer without being a distributor under Section 10 (2) by using open access. There is absolutely no justification for charging a captive power producer a cess of 10 paise per unit, whereas a non-captive power producer is not charged any cess whatsoever.

Example (3) : A captive generating plant uses power itself either by way of captive use or auxiliary consumption and the independent power producer also uses power itself by way of auxiliary consumption. A captive generating plant is charged 10 paise per unit for this use, whereas the independent power producer is not charged any cess. This is clearly discriminatory and there is no rational relation to any legal objective to be achieved by this classification.

Example (4) : A captive generating plant sells power to a consumer and the State Electricity Board also sells power to a consumer. The captive generating plant is charged 10 paise per unit, whereas the Board is charged only 5 paise per unit. This discrimination is also based on no rational relation to any legal objective to be achieved. There is no good reason shown by the State why a consumer who purchases power from a captive generating plant should be discriminated against *vis-à-vis* a consumer of the electricity supplied by the State Electricity Board. It has been held in number of cases that the source of electricity is irrelevant for the purpose of taxation. In **M/s Swaroop Vegetable Products Industries**

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vs. State of U.P. & others [40] the Hon'ble Supreme Court observed thus :

> " 5. ..... The taxing event being the consumption of energy, the source from which the electricity is acquired would become altogether irrelevant..... "

In State of Mysore Vs. West Coast Papers Mills Ltd. & another [41], the Hon'ble Supreme Court observed thus :

> " 10..... The purposes for which the energy has been consumed would not make any material difference for the purposes of the levy of tax under the Act.
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> 11. It is not disputed on behalf of the respondent company that if it has used electrical energy generated by the State Electricity Board for generating further electrical energy, the use of such energy generated by the Board would have attracted the provisions of the Act for liability to pay electricity tax. It would, in our opinion, make no difference that the electrical energy used by the respondent company for generating further electrical energy was that which had been generated by itself. Sub-section (3) of Section 4 reproduced above makes it clear that electricity tax would be payable if a person consumes electrical energy generated by himself. The sub-section thus puts the consumption of energy generated by the consumer himself at par with the consumption of energy generated by someone else. The definition of the word "consumer" also shows that it would include a person who consumes energy generated by himself. The proposition that in the

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40. AIR 1984 SC 20 ;

41. (1975) 3 SCC -448 ;

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matter of the levy of electricity tax the Court should differentiate between cases wherein the energy consumed has been generated by someone other than the consumer and those wherein such energy has been generated by the consumer himself cannot, therefore, be countenanced. "

In **J.C. Mills, Gwalior Vs. State of M.P.** [42], the Madhya Pradesh High Court held thus :

" 5. ..... Where it comes from is altogether immaterial for this purpose. It may come from power plant owned by the consumer himself, or it may come from a power plant owned by somebody else, in which latter event, the consumer may be paying a price. While taxing the consumer for the electrical energy supplied to him for consumption, the State is not concerned with the place of its origin. "

In **Delhi Cloth & General Mills CO. Ltd. vs. M.C.D. & others** [43], Delhi High Court held thus :

" 17..... We find that imposition of tax at the rate of 5 paise per KWHR on the consumers of electricity on energy generated by themselves vis-à-vis those consumers who get energy from M.C.D. is per se unreasonable, arbitrary and discriminatory. In fact the M.C.D. appears to be taxing the consumers of electricity generated by themselves at the impugned rate for its failure to perform its statutory duties. The learned Single Judge was right in holding that the levy was discriminatory."

Example (5) : The captive power producer sells to a third party, and any distributor other than the State Electricity Board also sells to a third

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42. AIR 1959 MP – 365 ; 43. (1993) 49 Delhi Law Times 83 ;

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party, but only the captive power producer is charged 10 paise per unit, whereas the other distributor is charged with only 5 paise per unit. This instance is also clearly discriminatory and the same reasoning of the previous example where the distributor was the Board would squarely apply. In fact, other distributor not even being State, the respondents' defence of classification based on party being State would also not be available.

Example (6): Let us say that two captive plants have been set up. In one the captive consumption is 51% of the generation and in the other it is only 50% of the generation. The first plant would qualify as a captive generating station under Rule 3 of the Electricity Rules, 2005, whereas the second plant would not, its captive consumption being below 51%. Such captive plant would, therefore, have to pay 10 paise per unit both on its captive consumption as well as on its sale to the State Electricity Board or to third parties. On the other hand, the other producers who consumes only 50% of its generation would have to pay no cess whether on electricity consumed by it or on electricity sold by it to the Board or to other third parties.

(24). In the return filed by the State of Chhattisgarh, it is stated that the captive generating stations are for a commercial purpose as opposed to a public purpose since they are producing electricity essentially for their own consumption rather than for supply to consumers or to the State Electricity Board which will ultimately supplied to the consumers. This defence put-forth in the return is hollow and meritless. It is an accepted fact that there is a shortage of power in the country and also in the State of Chhattisgarh and that there is a huge gap between the demand and supply of power in the State so much so that heavy power cuts are

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imposed in the State for the last few years. It is, therefore, an accepted policy of the Central Government as well as the State Government to encourage setting up of power plants and to encourage more generation of electricity. This can be either by way of independent power plants or by way of captive generation. Both the systems would add to the availability of electricity and, therefore, reduce the gap between the demand and supply of the electricity. It is not correct to state that a captive power plant is for commercial purpose and is not in public interest. In fact, in all policies whether of the Central Government in the National Electricity Policy or of the Ministry of Power in the Tariff Policy or in the Captive Power Policy of the State Government, the captive power generation has been encouraged. In fact, captive power plants are exempted from payment of electricity duty including in the State of Chhattisgarh so as to encourage setting up of captive generating plants in the State.

(25). National Electricity Policy under the heading of Captive Generation notes as under :

> "5.2.24. The liberal provisions in the Electricity Act, 2003 with respect to setting up of captive power plant has been made with a view to not only securing reliable, quality and cost effective power but also to facilitate creation of employment opportunities through speedy and efficient growth of industry.
>
> .....
>
> 5.2.26.A A large number of captive and standby generating stations in India have surplus capacity that could be supplied to the grid continuously or during certain time periods. These plants offer sizeable and potentially competitive capacity that could be harnessed for meeting demand

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for power. Under the Act, captive generators have access to licencees and would get access to consumer who are allowed open access. Grid interconnections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid...."

(26). National Tariff Policy specifically disapproves the imposition of the duties, taxes, cess etc. on consumption of electricity by linking it to generation like captive generation on a non-uniform basis. The relevant portion of the tariff policy provides thus :

"5.4. While it is recognized that the State Government have the right to impose duties, taxes, cess on sale or consumption of electricity, these could potentially distort competition and optimal use of resources especially if such levies are used selectively and on a non-uniform basis.

In some cases, the duties etc. on consumption of electricity is linked to sources of generation (like captive generation) and the level of duties levied is much higher as compared to that being levied on the same category of consumers who draw power from grid. Such a distinction is invidious and inappropriate. The sole purpose of freely allowing captive generation is to enable industries to access reliable, quality and cost effective power. Particularly, the provisions relating to captive power plants which can be set up by group of consumers has been brought in recognition of the fact that efficient expansion of small and medium industries across the country will lead to faster economic growth and creation of larger employment opportunities"

(27). The Government of India had constituted a High Power Task Force. The Task Force included a Member of Planning Commission, Economic Adviser to the Prime Minister, Secretary Power, Revenue Secretary, Chairman, Central Electricity Authority and other Co-opted Members including Shri F.S. Nariman, M.P. and a well-known Senior Advocate and Jurist. The relevant portion of the Task Force report reads as under :

> " The Task Force has also noted with concern that several states are imposing duties on captive generation and thereby discouraging addition of capacity. Go, in recognition of the need to add capacity at an accelerated pace, has reduced the taxes and duties applicable on equipment required by power sector, including on generation. The States should also reciprocate such measures in their own policies and refrain from imposing duties specifically on captive generation. "

(28). The Chhattisgarh State Electricity Regulatory Commission recommended reconsideration of the cess on generation by captive power plants. The recommendation of the Chhattisgarh State Electricity Regulatory Commission is the following :

> " 18. Recommendation to the State Government : Before we conclude, we would like to comment on specific issue concerning the State Government which has been brought to our notice. The State Government has imposed a cess of 10 paise per unit on the total power generated by the CPPs, the purpose of which is not very clear. Apparently there was some justification for the cess when the State was surplus in power and the CSEB did not want to encourage captive plants. The provisions of the Act, the NEP and NTP have introduced a liberal regime for CPPs, the objective being to promote captive generation and encourage

CPPs to put their surplus in the grid. The Board in fact, is already availing more than 200 MW from CPPs at present, and even that does not fully meet the power deficit in the State. That being the position and also in view of the national policy, the State Government should reconsider the cess on generation by the CPPs. "

(29). Under Section 86 (2) of the Electricity Act, the State Commission shall advise the State Government on all or any of the following matters, namely, :

"(i) Promotion of competition, efficiency and economy in activities of the electricity industry ;

(ii) promotion of investment in electricity industry ;

(iii) reorganisation and restructuring of electricity industry in the State ;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

(30). Under Section 86 (4), the State Commission shall be guided by the National Electricity Policy and National Tariff Policy which are published under Section 3 of the Act. The imposition of a discriminatory and substantial cess on captive power plants alone, will certainly have impact on the investments in electricity industry. It will impact the promotion of competition, efficiency and economy in activities of electricity industry and matters concerning with generation of electricity. Since all these aspects are statutorily within the purview of the State Commission, the advice of the State Commission would be binding on the State Government. The imposition of the impugned cess by the State Government is contrary to the specific advice of the Chhattisgarh State Electricity Regulatory

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Commission, as also the National Electricity Policy and the National Tariff Policy published under Section 3 of the Act by which the State Commission is to be guided. The State Electricity Regulatory Commission is also supposed to determine tariff under Section 62 of the Act and for this also it is to be guided by the National Electricity Policy and the National Tariff Policy. The discriminatory cess imposed under the impugned provision on captive power producers is totally contrary to the provisions of the several national and State policies referred to above. We, however, hasten to add that a sovereign Legislature like the Chhattisgarh State Legislature, in law-making, is not bound by the policy decisions or recommendations. We have referred to policy decisions and recommendations only to highlight the fact that the impugned provision is arbitrary, discriminatory and unreasonable and violative of Article 14 of the Constitution of India and also to show that in the circumstances of the case, the impugned levy is capricious and whimsical.

(31). Having regard to the examples given above and having regard to the several State policies to encourage setting up of captive power plants in the public interest and since we do not find any rational basis for the classification made by the Legislature to treat the captive power plants with hostile discrimination, we are of the considered opinion that the impugned provision is liable to be declared as unconstitutional being violative of Article 14 of the Constitution of India.

32. In the result and for the foregoing reasons, we allow these writ petitions and declare the impugned Section 2 (2) of the Chhattisgarh Upkar (Sanshodhan) Adhiniyam, 2004 (Amendment Act No.28 of 2004) inserting Section 3 (1-a) in the 1981 Adhiniyam as unconstitutional. A writ of mandamus shall issue to the respondents forbearing them from levying

and collecting energy development cess from the petitioners under Section 3 (1-a) of the Act. We further quash the bills raised under Section 3 (1-a) of the Act and impugned in these writ petitions. In the facts and circumstances of the case, the parties shall bear their respective costs.

Sd/-
Chief Justice

Sd/-
D.R. Deshmukh
Judge

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